

October 9, 2014

Horst Greczmiel
Associate Director for NEPA Oversight
Council on Environmental Quality
722 Jackson Place, NW
Washington, DC 20503

Re: Request for Public Comments on NEPA Draft Guidance “Effective Use of Programmatic NEPA Reviews”

Dear Mr. Greczmiel:

Please accept and consider these comments on behalf of The Wilderness Society (TWS) and National Parks Conservation Association (NPCA) regarding the Council on Environmental Quality’s (CEQ) proposed guidance on “Effective Use of Programmatic NEPA Reviews” published for review and comment in the Federal Register on August 25, 2014. We are encouraged by CEQ’s initiative to promulgate more detailed programmatic NEPA review guidelines. Clear guidance, as well as additional follow-up by CEQ, will help agencies better analyze broad environmental impacts, which in turn will improve planning parameters and procedures for future related actions and site-specific projects. While we support CEQ’s proposal, we are providing the following comments and recommendations that we believe will further CEQ’s objectives and maximize the positive impacts of this proposal.

I. Introduction

TWS and NPCA generally support CEQ’s proposed programmatic NEPA guidance, and we believe it can facilitate a more thorough and useful NEPA review process. By identifying broader, cumulative environmental impacts on areas with similar geography, use characteristics (i.e. solar or wind energy) or stages of development earlier in the process, agencies will be able to focus on subsequent project- or site-specific impacts, leading to improved efficiency but also ensuring that the right level of environmental analysis is conducted.

While improving agency efficiency is beneficial, it cannot come at the expense of public participation and sufficient review of potential environmental impacts. As the CEQ

guidance on programmatic NEPA review notes, agencies have been caught in a “shell game” whereby they repeatedly defer consideration of specific impacts to subsequent tiers within NEPA review process. We support tiering a more detailed impact assessment at the project-specific level to a programmatic environmental impact statement (PEIS), but only when the programmatic analysis is sufficient to support such tiering. Avoiding the “shell game” must be a central component of CEQ’s programmatic NEPA guidance to eliminate endless deferral of environmental impacts analysis.

Using a programmatic NEPA review process as an umbrella assessment for a particular program on public land – such as solar or wind energy production – can help streamline future efforts without sacrificing assessment quality. By applying a front-loaded review process through an agency-initiated P EIS or Programmatic Environmental Assessment, future projects will benefit from a simplified, more efficient, but no less thorough, process. Allowing agencies to refer back to broad NEPA reviews to supplement more nuanced reports prepared for future actions will both eliminate unnecessary repetition and help filter out incompatible alternatives at the outset.

II. Recommendations

A. Issuance of Guidance and Responsible Use of Programmatic NEPA

These guidelines come at an important time as agencies are initiating programmatic-level reviews and are revising their land use and resource management policies, as well as updating their approach to focus more on landscape level planning. Creating high-level baseline information relating to broad areas, time periods or policies can supplement subsequent tiered NEPA reviews and ensure sufficient environmental impact analysis has been completed. It can also encourage more landscape-scale assessments and provide more guided development across landscapes. The success of the programmatic NEPA review approach, however, will depend on its responsible use and proper implementation. The examples below provide both elements to highlight in guidance and the need for this guidance to be as timely and strong as possible.

The Bureau of Land Management (BLM) and the Department of Energy recognized a need to construct a more efficient and effective system to respond to growing solar energy development interests across public lands. In response, the BLM prepared a Solar Programmatic Environmental Impact Statement (Solar PEIS) to guide evaluation and permitting of solar energy development on public lands at the broad utility-level scale. Using the Solar PEIS (finalized in 2012), the BLM is continuing to develop and implement agency-specific programs and/or guidance based on consistent environmental policies and mitigation strategies for all solar energy projects occurring on its land. Follow-on policy has been issued and a number of projects are being analyzed that both tier to the PEIS and incorporate needed levels of site-specific analysis. Many of the elements set out and following on the Solar PEIS can serve as examples for future BLM actions and for other agencies.

Another emerging landscape scale initiative is the BLM's efforts to incorporate landscape-level planning into its management of the public lands. BLM's Planning 2.0¹ is intended to facilitate better land use planning by considering broader landscape-scale boundaries, instead of limiting analysis to jurisdictional lines. In addition, California's recently released draft Desert Renewable Energy Conservation Plan (DRECP)² is setting out a comprehensive, effective mitigation and conservation strategy across desert landscapes while also supporting efficient, responsible renewable energy development in the plan area. Further, this plan area includes significant acreage managed by the National Park Service, and so the DRECP will address ways to benefit conservation across agencies. Guidance from CEQ can support and direct the goals of these processes, and the scope of these ongoing efforts also highlights aspects of programmatic NEPA that should be explicitly addressed by CEQ.

Recommendations: We recommend that CEQ adopt language that clarifies when a broad area, time period or policy should trigger agencies to use or consider using a programmatic approach for NEPA review – i.e., when there are significant changes in technology or demand for a type of energy development, when addressing issues that cross agency planning areas or agency jurisdictions. CEQ should provide additional guidance on how agencies should execute a programmatic NEPA review process effectively and responsibly to prevent the “shell game” risk of repeated issue deferrals and explicitly address the challenges of structuring programmatic NEPA for varying levels of landscape planning – including setting out in the programmatic document the scope of analysis that is being conducted and what is not being conducted/still needs to be analyzed in future analysis prior to approving actions.

B. Public Participation Requirements

We are pleased that the current draft highlights the importance of public participation in all stages of programmatic review. Public participation is the backbone of public land management and an inclusive, transparent, and open process will ensure a better outcome based on the most information, also leading to greater stakeholder satisfaction with the end result. Similarly, incorporating the public into the environmental review process as early as possible will, as CEQ notes, maximize agencies' abilities to identify and address public concerns earlier, clarify procedural ambiguities, and validate public input from the outset.

Conversely, if agencies fail to establish a good working relationship at the outset, agencies will face more conflicts that negatively impact the streamlining benefits associated with using a programmatic NEPA review process. Public engagement and information sharing is particularly important in programmatic NEPA, which is often addressing a broad range of locations or new policies, technologies or pressures, public education, or other complex issues. A positive example of effective and inclusive public

¹ BLM: Planning 2.0, http://www.blm.gov/wo/st/en/prog/planning/planning_overview/planning_2_0.html (visited 10/08/2014).

² Desert Renewable Energy Conservation Plan, <http://drepcp.org/> (visited 10/08/2014).

engagement during the programmatic review period is illustrated by BLM's Solar PEIS process. Public involvement began during scoping in 2008, progressed from the release of the Draft Solar PEIS, through a supplement, and continues through participation in follow-on studies for a pilot program of the PEIS and evaluation of specific solar projects.³ This has been a very inclusive and responsive process, which provides a useful template for future programmatic reviews.

Recommendations: We encourage CEQ to strengthen the guidelines' public participation requirements – stating explicitly that public participation should be proactively encouraged and more robust for programmatic NEPA. In addition to clarifying the kinds of actions and steps agencies must take to ensure sufficient public involvement throughout the process, CEQ should also require agencies to develop NEPA review guidelines in their internal guidance that specifically address how to actively engage the public before and during the agency's programmatic NEPA review processes. This will not only create a uniform experience for public participants across agencies, but also set a stronger baseline agency standard for public involvement.

C. Avoiding the “Shell Game” while Improving Agency Efficiency

While some impact assessments will have to be deferred to tier 2 or tier 3 NEPA review, there is a risk that these deferred assessments will slip through altogether. CEQ's current draft acknowledges this concern and attempts to address it by providing useful direction and requirements to eliminate “undue deferral.” CEQ's proposed guidance encourages agencies to “clearly and concisely articulate their intentions to defer particular environmental review and consultation requirements”. *See*, Draft Guidance, at 23. However, the proposed guidance does not provide enough detail as to how agencies will ensure the “shell game” of deferment does not go on indefinitely.

To ensure a programmatic NEPA document is broad enough, some details must be left for subsequent planners to assess. However, agencies must balance the need to consider certain issues at the next tier with the need to prevent nullifying the EIS process altogether through issue deferring. It is essential that the NEPA environmental review process is sufficiently rigorous enough up front so that specific projects can utilize and benefit from that work in future project-level NEPA. .

CEQ's regulations already clarify that the use of programmatic NEPA is based on the definition of the “program” that is analyzed, which then limits tiering. *See* 40 C.F.R. § 1502.20 (emphasis added). The guidance should emphasize this limitation and reiterate that there must be sufficient information to conduct a meaningful analysis at each level – stating that where there are not “specific discussions” of environmental impacts, there is nothing to tier to, and those discussions will need to be completed at the next level. Also,

³ Public Involvement. Solar Energy Development Programmatic EIS.
<http://solareis.anl.gov/involve/index.cfm> (visited 10/08/2014)

as noted CEQ’s “NEPA’s Forty Most Asked Questions”⁴, a series of EISs may be needed even where there is programmatic NEPA. CEQ should highlight that this may be needed and especially where subsequent actions will have a broad range of site-specific impacts, as we have seen in implementing the Solar PEIS.

Recommendations: CEQ should clarify what steps agencies should take to prevent the “shell game” – including explicitly defining the scope of NEPA that is being conducted and is not being conducted in the programmatic document and describing the scope of NEPA that will still be required to authorize actions. CEQ should also emphasize that tiering cannot occur if an issue has not been specifically addressed and that EISs may still be required to authorize actions.

D. Mitigation and Monitoring

We agree with CEQ that programmatic NEPA reviews provide an excellent opportunity for agencies to incorporate comprehensive mitigation planning and monitoring strategies into the federal policymaking process earlier, at a broad scale, and not only at more narrow, site-specific levels. *See*, Draft Guidance, at 29-31. We note that the Solar PEIS incorporated significant avoidance and minimization measures at the programmatic level, as well as a framework for further mitigation, and is now moving forward with regional mitigation plans for solar energy zones.

Mitigating negative impacts across public lands can and should be a key element of all programmatic NEPA review processes and not limited to the tiered site-specific review processes alone. Under NEPA, the BLM is required to discuss mitigation measures when conducting an EIS.⁵ As part of this process, agencies are required to address the issue of mitigation through a series of questions and to defer to projects that “avoid” negative impacts. Projects and alternatives proposed with no negative environmental impacts become the required option.⁶ By avoiding adverse impacts in the first place, there is no need to take further action to minimize or offset such impacts.⁷ If avoiding negative impacts is not practical or possible, the second step within the mitigation hierarchy requires the agency to minimize the associated impacts created by the project.⁸ This can be accomplished by changing or modifying designs, technology, location, etc. Finally, projects may have to compensate for, or offset, any impacts that cannot be either avoided or minimized.⁹

⁴ <http://energy.gov/sites/prod/files/G-CEQ-40Questions.pdf>

⁵ 42 U.S.C. § 4331 (2014); 40 C.F.R. §§ 1502.14, 1502.16 (2014).

⁶ JOEL P. CLEMENT ET AL., THE ENERGY AND CLIMATE CHANGE TASK FORCE, A STRATEGY FOR IMPROVING THE MITIGATION POLICIES AND PRACTICES OF THE DEPARTMENT OF THE INTERIOR: A REPORT TO THE SECRETARY OF THE INTERIOR 2 (Apr. 2014), *available at* http://www.doi.gov/news/upload/Mitigation-Report-to-the-Secretary_FINAL_04_08_14.pdf.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

To maintain the NEPA requirement that agencies consider mitigation strategies to minimize negative impacts caused by approved projects, the programmatic NEPA process must also include a mitigation component that addresses avoidance, minimization and compensation. Monitoring plans should also be incorporated into programmatic decisions so that if mitigation measures are not succeeding, the agency will be aware as soon as possible and take action to update mitigation. These NEPA regulations should be implemented in programmatic reviews, not just during the second or third tier review process.

Recommendations: We recommend that CEQ reframe its proposed mitigation and monitoring guidelines to ensure agencies are not only identifying potential adverse impacts during the broad programmatic planning process, but also reviewing best management practices, operating standards and procedures, and most effective mitigation strategies whenever possible. Relatedly, agencies should also be required to incorporate not only monitoring but also triggers and methods to update mitigation requirements depending on monitoring results.

E. Incorporating New Information and Policy into Programmatic NEPA Decisions

Since circumstances underlying programmatic NEPA may change, impacting projected outcomes and impacts, CEQ should ensure that agencies have the necessary checks and balances in their programmatic processes to ensure that they address changes in policy, conditions or information that could impact the effectiveness and proper execution of the agency's programmatic NEPA review process. For example, the BLM's manuals on inventory and management of lands with wilderness characteristics were issued at the end of the Solar PEIS planning process and well after the finalization of the Wind Energy PEIS and West-wide Energy Corridors PEIS. The Solar PEIS explicitly addressed protections for this resource as it is identified, but the earlier programmatic EISs did not. BLM is now updating inventories and evaluating impacts on lands with wilderness characteristics as part of new projects under all of these documents, but the process is not as clear or consistent as it should be.

Further, some programmatic documents may become obsolete as technology or information is updated. For example, earlier statewide oil and gas EISs prepared by the BLM did not incorporate best management practices such as directional drilling, clustered development and interim reclamation, did not take into account new uses of the same lands that could affect development (such as wind energy) and predated the BLM's updated approach to oil and gas leasing. As a result, so much of a programmatic decision documents can be out of date, that simply waiting for new plans may not be sufficient.

Recommendations: Agencies should be required to design their programmatic NEPA review with triggers or expiration dates that will require agencies to reassess their programmatic plans as changes in action or time require, so that there will be a new review, including public participation. Further, programmatic documents should state that

their decisions will be subject to adjustments based on new data, information or policy that has a substantial impact on the analysis and decisions.

III. Conclusion

Thank you for this opportunity to comment on the draft guidance. We appreciate CEQ's effort to enhance the clarity and utility of programmatic NEPA reviews while also ensuring the role of an informed public in providing meaningful input into government decisions. The need for clarity on the intersection between programmatic NEPA analysis and site-specific impact assessment is paramount. We would be pleased to discuss these issues further or answer any questions.

Sincerely,

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